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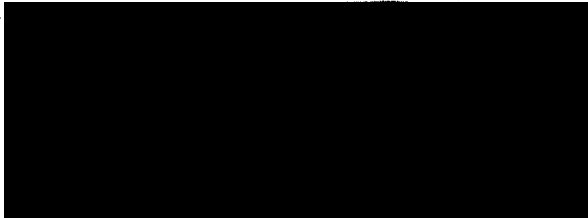
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U.S. Citizenship
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Services

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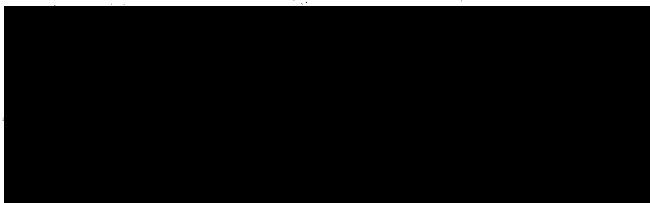
FILE: WAC 01 258 53336 Office: CALIFORNIA SERVICE CENTER Date: **OCT 01 2004**

IN RE: Petitioner:
Beneficiary:



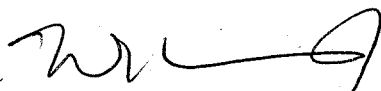
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in June 1992. It imports, exports, purchases, sells, and distributes cattle and boxed beef. It seeks to employ the beneficiary as its commercialization manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner submits a brief in response to the director's decision.

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In an attachment to the Form I-140, Immigrant Petition for Alien Worker, the petitioner described the beneficiary's proposed duties as:

Manages and directs day-to-day operation of the U.S. subsidiary. Supervises, directs and coordinates lower-level managers. Directs and coordinates customs and transportation/forwarding departments. Coordinates U.S. and Mexican business operations, logistics for import/export etc. Acts as liaison between the lower-level management and the company executives. Exercises wide latitude in discretionary decision-making involving setting policy guidelines and long-term fiscal and budgetary goals, devising and implementing compliance mechanisms and marketing strategies, organizing regional training, and negotiating contracts.

The petitioner also provided its organizational chart showing the beneficiary as commercialization manager reporting to the vice-president. The chart also reflected the beneficiary's position directly over two filled positions of cattle purchase department manager and warehouse supervisor. The chart also showed the beneficiary's position directly over two outside services: (1) involving customs services, and (2) a forwarding agency. The chart depicted a fifth position in the boxed beef purchase department as unfilled. The chart also showed that a purchase assistant manager/secretary reported to the cattle purchase department manager and an additional two outside agencies reported to the warehouse supervisor. Counsel for the petitioner noted that the petitioner employed five full-time employees in the positions of vice-president, the beneficiary's position of commercialization manager, cattle purchase department manager, warehouse supervisor, and assistant purchase manager/secretary.

On December 20, 2001 the director requested: (1) a copy of the petitioner's organizational chart including the current names of all executives, managers, supervisors, and number of employees within each department; (2) a brief description of job duties, educational level, date of employment and annual salary for each employee under the beneficiary's supervision; (3) a more detailed description of the beneficiary's duties including the approximate percentage of time the beneficiary spent in each of the duties; and, (4) copies of the petitioner's California Form DE-6, Quarterly Wage Reports, for all employees for the last four quarters.

In response to the request for evidence, counsel for the petitioner stated that the beneficiary had the following specific duties:

- Monitors national and international prices for livestock cattle and boxed beef – 6%
- Defines prices and sales strategies for boxed beef – 3%
- Manages and supervises purchase of live cattle – 7%
- Manages and supervises purchase of boxed beef – 10%
- Supervises and coordinates independent contractors and ensures compliance with the company's policies; devises and implements compliance mechanisms – 8%
- Prepares weekly reports (sales/purchase cattle/purchase boxed beef – 7%
- Devises, implements and oversees marketing – 14%
- Attends weekly sales meetings with the sales department of the foreign company to coordinate operations 2%

- Acts as liaison between the lower-level management and the company executives; hires/fires/oversees lower-level management – 13%
- Sets policy guidelines and long-term fiscal and budgetary goals – 20%
- Negotiates contracts – 10%

The petitioner provided the same organizational chart but added job descriptions, educational levels, and salaries of the employees. The chart also showed that the position in the boxed beef purchase department had been filled. The petitioner listed the duties of five employees as: (1) a cattle purchase manager who receives orders for livestock, monitors prices and inventories, purchases live cattle, supervises the export process, follows up with evaluation results and creates reports; (2) a boxed beef purchase employee who receives offers, monitors variables of the meat industry, compares quotes from suppliers, purchases boxed beef, creates delivery and payment schedule, receives necessary export documentation, creates reports, and meets with California customers; (3) a warehouse supervisor who receives Mexican shipments of boxed beef, creates reports on condition of boxed beef, prepares client's orders, creates packing list, ensures accurate deliveries, provides weekly fiscal inventories, schedules meetings with outside service supervisors, and controls working hours for service workers; (4) a purchase assistant/manager secretary who assists the purchase cattle manager, receives documentation for exporting live cattle, creates shipment and suppliers' payment schedules, and creates weekly purchase cattle reports; and, (5) a sales assistant who assists the commercialization manager, answers the phone, provides customer services, takes orders, invoices boxed beef, is responsible for accounts payable, and creates sales reports.

The petitioner also provided its California Forms DE-6 for the year 2001. The California Form DE-6 for the quarter in which the petition was filed showed that the petitioner employed six individuals for the quarter, including an individual in the previously vacant position of boxed beef purchase department. The petitioner did not include the hiring date of the individual in the boxed beef purchase department.

The director determined that the petitioner had not established the need for an executive as the petitioner is a small six to eight employee business. The director also determined that the beneficiary's position is, in essence, a first-line supervisory position over non-professional employees. The director concluded that the petitioner had not established that the beneficiary had been or would be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner contends that 85 percent of the beneficiary's job duties comprise executive duties including 37 percent establishing general goals and policies, 23 percent exercising wide latitude in discretionary decision-making, and 25 percent directing the management of a major function. Counsel points out that the petitioner's number of employees is not dispositive. Counsel cites an unpublished decision in support of this point. Counsel asserts that the beneficiary is also employed in a managerial capacity. Counsel claims that the beneficiary manages an essential function, as well as, manages managerial or supervisory employees. Counsel also disagrees with the director's conclusion that the cattle purchase department manager and the boxed beef purchase manager positions are not professional positions. Counsel contends that the duties of these positions include managerial purchasing and market research analysis, duties identified in the Occupational Outlook Handbook as professional.

Counsel's assertions are not persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In addition, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In this matter, counsel for the petitioner refers to the beneficiary both as an executive directing the management of a function of the petitioner and as a manager managing an essential function and professional, supervisory, or managerial employees. Although the regulations do not preclude an individual from performing in both an executive and managerial capacity, the petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing a beneficiary is both an executive and a manager. The petitioner has not done so in this matter.

The petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "[setting] policy guidelines and long-term fiscal and budgetary goals," and "[devising], implement[ing] and oversee[ing] marketing." The petitioner did not, however, define the goals, policies, or clarify who actually provides the market research. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Contrary to counsel's assertion the petitioner did not specifically indicate that the cattle purchase department manager and the boxed beef purchase manager provide market research or market analysis.

In addition, the petitioner describes the beneficiary as negotiating contracts, monitoring prices, and defining prices and sales strategies for boxed beef. When the beneficiary performs work to sell the product, including negotiating contracts, he is performing tasks necessary to provide a service or product. These duties will not be considered managerial or executive. The AAO cannot determine whether monitoring prices and defining prices and sales strategies are tasks that relate to executive or managerial duties or whether these tasks are primarily operational tasks. However, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel claims that the beneficiary spends 25 percent of his time (8 percent supervising and coordinating with independent contractors and 17 percent managing and supervising the purchase of live cattle and boxed beef) directing the management of a function. However, if a petitioner claims that the beneficiary is directing

the management of a function, the petitioner must identify the function with specificity. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's duties demonstrating that the beneficiary directs the management of the function rather than performs duties relating to the function. *See Matter of Church Scientology International, supra*. In this matter, the petitioner has not substantiated that it employed anyone in the boxed beef purchase department until after the petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel's claim that the beneficiary also manages an essential function as described in the managerial capacity definition is also not persuasive. Counsel claims that the essential function in this matter includes purchasing, import services and customs. However, counsel does not clarify whether "managing" these tasks also includes directing the management of these tasks as previously claimed. Again, however, the petitioner has not identified the particular function with specificity, articulated the essential nature of the function, and has not established the proportion of the beneficiary's daily duties attributed to managing the essential function. Nor has the petitioner provided a sufficiently comprehensive description of the beneficiary's duties that demonstrates that the beneficiary manages the function rather than performs the duties relating to the function.

Moreover, although counsel asserts that the beneficiary is managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. Contrary to counsel's claim that the warehouse supervisor and the cattle purchase department manager are managers or supervisors, the petitioner does not provide a job description for either employee that indicates the employees' time is spent primarily managing or supervising. In addition, the petitioner's job descriptions do not coincide with the petitioner's claimed organizational structure. For example, the organizational chart shows the sales assistant reporting to the individual in the purchase boxed beef department, however her job description indicates she assists the commercialization manager. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In addition, a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. As observed above, the petitioner has not submitted sufficient job descriptions to conclude that the cattle purchase department manager and the boxed beef purchase manager hold professional positions. The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). The petitioner has not provided evidence that either of these positions require advanced knowledge or learning, not merely skill, to perform the tasks associated with the position. Further, as observed above, the boxed beef purchase employee apparently was not on staff when the petition was filed. Because the beneficiary is primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

Counsel correctly notes that the petitioner's number of employees is not dispositive. A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The AAO notes that the director's subjective statement that the petitioner's business does not require an executive is improper without an adequate explanation or foundation. Although the appeal will be dismissed, it must be noted that the director based her decision in part on an improper standard. In her decision, the director concluded that the petitioner did not have a reasonable need for an executive because it was a small six to eight-employee business. Such a conclusion is inappropriate. The director should not hold a petitioner to her undefined and unsupported view of "common business practice" or "standard business logic." The director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. Although CIS must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some reasonable basis for finding a petitioner's staff or structure to be unreasonable. Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in sales or services will not preclude the petitioner from qualifying for classification under section 203(b)(1)(C) of the Act.

However, as determined above, the petitioner has not provided a comprehensive description of the beneficiary's duties and has not provided evidence that the beneficiary's subordinates relieve the beneficiary from performing primarily non-managerial and non-executive tasks. Furthermore, to establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra*. The petitioner has not established that the beneficiary's assignment is primarily managerial or executive.

Counsel's citation to unpublished matters carries little probative value. Counsel has not furnished evidence to establish that the facts of the instant petition are analogous to those in the unpublished cases. Moreover, unpublished decisions are not binding on CIS in its administration of the Act. See 8 C.F.R. § 103.3(c).

Beyond the decision of the director, the petitioner has not submitted sufficient evidence demonstrating that the beneficiary had been employed for the foreign entity in a managerial or executive capacity. Again, the petitioner provided a general description of the beneficiary's duties for the foreign entity. In addition, the foreign entity's organizational chart shows that the beneficiary was a first-line supervisor of five sales personnel and one inventory employee. The record does not demonstrate that the beneficiary's foreign employment was primarily managerial or executive.

For this additional reason, the petition will not be approved. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.